Better Judgment

By EMILY BAZELON  JUNE 17, 2015

Nearly 100 years ago, Oliver Wendell Holmes Jr. stood at an upright desk in his study, dipped a pen into an inkwell inherited from his father and wrote a Supreme Court opinion allowing the government to imprison people for speaking out against World War I. Holmes was 77 on that day in February 1919. He came to Washington 16 years earlier from Massachusetts after stints as a law professor at Harvard and a judge on the state Supreme Court, and he looked the part of a patrician New Englander, with his handlebar mustache and a bristling shock of white hair.

The question before Holmes, and the court, was whether the First Amendment posed a barrier to the prosecution of two middle-aged activists, Charles Schenck and Elizabeth Baer. Schenck was the secretary of the Philadelphia chapter of the Socialist Party; Baer was a doctor who took the minutes at meetings. In August 1917, they distributed thousands of copies of a leaflet that likened the draft to despotism and urged readers to write their congressmen demanding its repeal. Schenck and Baer were charged under the 1917 Espionage Act, which made it a crime to interfere with military operations or recruitment. Upon conviction, they were sentenced to six months and three months, respectively. Appealing to the United States Supreme Court, the pair argued that the First Amendment shielded their speech.
At the time, it was a novel argument, despite the Constitution’s promise that “Congress shall make no law . . . abridging the freedom of speech.” Holmes’s record suggested he wouldn’t be particularly receptive to Schenk and Baer. In 1905, he had notably dissented in *Lochner v. New York*, a case in which a majority struck down a progressive workplace regulation that limited bakers to working 60 hours a week. The decision was premised on a conservative economic theory, “liberty of contract,” which a majority of the court claimed gave people a right to work under any conditions, however harsh. Holmes rejected this libertarian idea in favor of a restrained view of individual rights.

In the Schenck case, however, his emphasis on limiting individual rights worked against protecting the speech of war protesters. So did his skepticism about the need to tolerate opposing views. “As a believer in society’s right to impose its will on the individual, he thought persecution of dissenters made perfect sense,” Thomas Healy explains in his authoritative and entertaining book about Holmes, “*The Great Dissent.*”

“It seems to me logical in the Catholic Church to kill heretics,” Holmes wrote in a letter, “and [for] the Puritans to whip Quakers — and I see nothing more wrong in it from our ultimate standards than I do in killing Germans when we are at war.” For a unanimous court, he rejected Schenck and Baer’s appeal in March 1919, saying their leafletting created a “clear and present danger” of bringing about “substantive evils” that Congress had the power to prevent.

That summer, Harold Laski, a 26-year-old Harvard instructor, asked Holmes to tea. Laski was an immigrant from a Jewish family with a past as a rabble-rousing activist, but he had improbably won Holmes’s affection through frequent letters devoted to books and ideas. Laski, determined to alter Holmes’s thinking on the First Amendment, had pressed the justice to reread John Stuart Mill’s “On Liberty,” in which the philosopher defended free speech as a hedge against human fallibility. “It is as certain that many opinions, now
general, will be rejected by future ages, as it is that many, once general, are rejected by the present,” Mill wrote.

Laski asked Zechariah Chafee Jr., a Harvard law professor, to come to his meeting with Holmes. Chafee had written one article that relied on Mill to lay out the truth-seeking purpose of “absolutely unlimited discussion” and another that chided Holmes for failing, in his opinion in Schenck, to see the “social interest behind free speech.” Over tea, Laski teamed up with Chafee, arguing that Holmes’s test for whether speech poses a “clear and present danger” should allow for more dissent and protest than he had envisioned.

Laski and Chafee weren’t the only ones lobbying Holmes. The previous summer, Learned Hand, who would become a keen appellate judge, buttonholed the justice on a train ride to Boston and argued for tolerance of opposing viewpoints. Holmes was gracious — “I enjoyed our meeting as much as you possibly could have,” he wrote afterward — but unmoved. When Hand continued to make his case, Holmes replied, “I am afraid that I don’t quite get your point.”

But in the fall of 1919, the Supreme Court heard another First Amendment case, Abrams v. United States, which concerned the prosecution of five Russian Jewish anarchists led by Jacob Abrams, a bookbinder. To protest President Woodrow Wilson’s decision to send troops to Russia, which they saw as an attack on the new Bolshevik government, the group printed two sets of leaflets. “Workers of the World! Awake! Rise!” one read in English. The other, in Yiddish, called on workers in munitions factories to strike.

Around that time, Laski himself was caught in a free-speech fight, after he made a rousing speech supporting the striking Boston Police force. Harvard donors and alumni bombarded the university with calls for his firing. Holmes was dismayed by his friend’s troubles. A few weeks later, in November, before his aching knees could betray him, Holmes once again stood to write. This time he drafted a dissent. The anarchists’ leaflets, he wrote, posed no clear and
present danger to the national war effort. In a final paragraph, Holmes laid out
the rationale for free speech that has anchored the First Amendment ever
since. Drawing on Mill and the economist Adam Smith, whose biography
Holmes also read at Laski’s suggestion, the justice wrote that as various beliefs
of the day topple over time, people may come to see “that the ultimate good
desired is better reached by free trade in ideas — that the best test of truth is
the power of the thought to get itself accepted in the competition of the
market.”

He went on: “That at any rate is the theory of our Constitution.” Nine
months earlier, he believed nothing of the kind. “I simply was ignorant,”
Holmes would later write in a letter of his previous view. His willingness to
learn is one reason we remember him as one of the country’s most influential
jurists.

Judges rarely change their minds. They often feel they can’t. When
they put on their robes, they wrap themselves in a mythos of authority and
certainty. They’re supposed to be distant, neutral and wise. They’re supposed
to have all the answers. “Lawyers and litigants project infallibility onto
judges,” says Jeremy Fogel, a federal judge in Northern California who directs
the Federal Judicial Center in Washington, which provides training for every
new federal judge that addresses the formidable social expectations that come
with the job.

Among those expectations is one that judges get it right the first time. And
so they hesitate to reverse a position they have previously taken. There’s an
additional reason for this reluctance: The law makes the rules for how people
order their lives. If courts are too quick to tear pieces of it down, people start
wondering if it’s safe to build anywhere. More than anything else, we look to
courts and judges for stability.

The Supreme Court generally follows its past precedents, a principle
called stare decisis, meaning “to stand by the things decided.” This idea was
forcefully articulated by Sandra Day O’Connor, Anthony Kennedy and David Souter in a 1992 case that reaffirmed the constitutional right to abortion established two decades earlier in *Roe v. Wade*. “The very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable,” the three justices wrote.

Sometimes, however, the rule of *stare decisis* has to bend, so that the courts, and the country, can break with the past. In the 1954 case *Brown v. Board of Education*, when the Supreme Court reversed the rule of separate but equal, enshrined 60 years earlier to justify racial segregation, the justices unanimously reinterpreted the Constitution to forge a new moral consensus.

In such cases, new justices have mostly rewritten the work of their predecessors. It’s far more rare for a single judge to acknowledge that he has changed his thinking, and even rarer for him to reverse his own opinion, rather than quietly joining someone else’s. The exceptions — judges who shift position and explain why — tend to be those who think pragmatically and empirically. They’re checking and rechecking their assumptions against the facts as they develop on the ground. We often think of appellate judges as being bound by the specific facts of a case, on one hand, and statutes, prior rulings or abstract principles on the other. But there can be other relevant evidence out in the world. That sort of evidence was pivotal in a Supreme Court shift in the 1940s. At the onset of World War II, the Supreme Court allowed public schools to demand that *all* students recite the Pledge of Allegiance and salute the flag. Emphasizing the value of “national cohesion,” the court rejected the religious freedom claims of Walter Gobitis, who said the schools were asking his children to violate their faith as Jehovah’s Witnesses by ascribing salvation to an earthly emblem. But after the decision, mobs attacked Jehovah’s Witnesses and burned their places of worship, and schools expelled children who refused to recite the pledge and salute the flag.

By 1943, when a similar case came to the court, three justices — Hugo
Black, William O. Douglas and Frank Murphy — voted with a new majority to overturn the 1940 ruling. Writing to explain “the reasons for our change of view,” Black and Douglas said the nation’s war effort did not “depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation.” Seeing the concrete effects of the law, the justices treated the principles at stake not as absolute, but as pliable.

Judges sometimes weigh other kinds of evidence, too: academic research (in Brown, the court cited a study about the harmful effects of segregation on black children); or the mounting impact of public opinion (a likely factor in the forthcoming same-sex-marriage rulings, whether or not the court says so). In a sense, an empirical approach turns judging itself into a form of social science. “Scientists constantly test their hypotheses against an ever-expanding body of knowledge,” Martha Minow, the dean of Harvard Law School, told me. “Progress depends on trial and error. Is that what judging is too?”

The question is especially relevant now because of the kinds of disputes the courts are being asked to resolve. Advances in fields like computer science, electrical engineering and biochemistry are introducing new complexity into litigation. “The way we think about intellectual property may not stay the same,” Minow says, citing one example. “Or free speech in the context of social media.” One question raised by a Supreme Court case this term is whether threats on Facebook are as dangerous as in-person threats.

At this moment in Washington, with the Democratic and Republican Parties increasingly polarized, and the president and Congress repeatedly deadlocked, President Obama has used executive orders to make policy on immigration, climate change and the rules of the road for the Internet. In response, his opponents have accused him of overstepping and have turned to judges to stop him.

As those disputes play out in the lower courts, the Supreme Court is about
to determine the fate of the Affordable Care Act and a new method of lethal injection, as well as same-sex marriage. Next term, the meaning of “one person, one vote” is on the docket, and abortion and affirmative action may be as well. Advocates on the right and the left are asking the courts to referee the country’s biggest social battles and reverse old rulings. Can states require abortion providers to have admitting privileges at a local hospital if this practice is not correlated with better care for patients? If a college-admissions system disadvantages Asian-Americans as well as white students, is it unconstitutional? The pleas for judges to change the law, in the face of new evidence, are coming from all sides.

David L. Bazelon, my grandfather, was one of the rare judges who publicly reversed himself on one of the biggest decisions of his career. The case involved a man named Monte Durham, who, after a long history of psychiatric illness and hospitalization, was charged in 1951 with breaking into a house. During his trial, he said he was not guilty by reason of insanity. The standard test at the time, which dated from the 19th century, set a high bar: A court had to find that a defendant didn’t know right from wrong or had given way to an “irresistible impulse.” Durham was convicted.

The case wound its way to the federal appeals court in Washington, where my grandfather sat. He wanted courts to better understand why people commit crimes and when to hold them responsible. “Time after time defendants from the lowest socioeconomic-cultural strata of society would troop before my court without our ever seeking to understand the causes of their behavior or whether our punishment schemes were at all relevant to the problem,” he later said. He decided to use the case to reimagine the insanity defense and set a new standard that became known as the Durham test: “An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect.” The new test was supposed to prompt psychiatrists to give “detailed and comprehensive testimony casting light on why the accused acted as he did,” as my grandfather put it, so as to explain the
context for the crime.

But the procedure he put in place proved unworkable in practice. As it turned out, the kind of testimony my grandfather hoped to elicit from psychiatrists didn’t materialize. Typically, an expert for the defense would give a defendant a diagnosis like schizophrenia, and an expert for the prosecution would disagree, and neither would explain his view in terms a jury could easily understand. After years of trying to change this, in 1972 my grandfather wrote a 30-page opinion that laid out the court’s unsuccessful efforts to make his test work. Acceding to the evidence, he and his colleagues ended the Durham test.

The idea that a judge should consider evidence about a law or a ruling’s effects has been a central tenet of legal thinking since at least the early 20th century. In that period, scholars known as legal realists challenged the opposing conception — usually called formalism — that law should logically derive from abstract principles. The realists wanted judging to be grounded pragmatically in evidence about consequences. Holmes was a protorealist: “The life of the law has not been logic: It has been experience,” he said, framing the law as “a reaction between tradition on the one side and the changing desires and needs of a community on the other.”

Today the debate between legal realism and formalism is entangled in politics. Formalists say that realism (or pragmatism, a related concept) is just a cover for a judge to impose his or her own ideological values. They argue that it’s the job of the legislature, not the judiciary, to take into account real-world consequences. Justice Antonin Scalia, the country’s foremost formalist, believes that the only way for judges to guard against ideological temptation is to apply his fixed theory of interpreting the text of a law based on its original meaning, especially when it comes to the Constitution. Scalia says that his approach allows him to separate his legal decision-making from his political inclinations. His critics say that formalism is equally political and that Scalia and other originalists have chosen a theory that helps them achieve their conservative goals.
Scalia’s main sparring partner in this fight is Judge Richard Posner, whom President Ronald Reagan nominated to the United States Court of Appeals for the Seventh Circuit. Posner is not a liberal, so he and Scalia don’t divide along the usual ideological lines. Instead, their argument is about whether it is really possible to separate law from politics. Posner, a self-defined pragmatist, is probably Holmes’s closest intellectual heir today. As a professor at the University of Chicago, where he still teaches, he was an early contributor to the law-and-economics movement, which tests legal rules against their predicted economic consequences. In the 1970s, Posner’s scholarship had a part in persuading the Supreme Court to become more hospitable to big business in the domain of antitrust law by showing that some market structures that appear to reduce competition could actually benefit consumers.

For years, Posner has argued that judges should be less concerned about theories or past precedents and “more open to the facts,” as he told me. “Most judges start with the old stuff,” he said. “But they should ask themselves, given modern conditions, what is the right result? When I get a new case, I ask myself, ‘What is the common-sense solution here?’”

If past precedents pose an obstacle, Posner argues, a judge can usually get around them by distinguishing the facts in the previous case from the current ones. He acknowledges that ideology, in the sense of moral and political values, will affect what a judge sees as “the right result.” To him, though, this is not a knock on pragmatism, but simply an “inescapable feature of legal judgment,” especially in the divisive cases that reach the Supreme Court. His solution is a diverse judiciary that reflects the political spectrum of the country.

These two ways of thinking, Scalia’s and Posner’s, are particularly relevant now as we await the Supreme Court’s decision on same-sex marriage. The question before the court is whether the Constitution, in guaranteeing people “equal protection of the laws,” requires recognition of same-sex marriage. To
Scalia, the answer is easy: “The Constitution neither requires nor forbids our society to approve of same-sex marriage,” because when it was written, it did “not forbid the government to enforce traditional moral and sexual norms.” To Posner, same-sex marriage bans are “about discrimination against the small homosexual minority” and about “the welfare of American children.” Last year, he heard two cases in which Indiana and Wisconsin defended their same-sex marriage bans by arguing primarily that the laws promote child welfare by inducing heterosexuals to marry, which leads to fewer “accidental” births and abandoned children. Same-sex marriage, the states claimed, could do nothing to alleviate this problem. Posner pointed out that the states were ignoring a key piece of evidence: Many abandoned children are adopted by gay couples. “Those children,” he wrote, “would be better off both emotionally and economically if their adoptive parents were married.” The bans failed the state’s own test of protecting children, and that is why Posner and his court struck them down.

Posner’s attention to consequences can lead him, like other empirically minded judges, to change his thinking. Eight years ago in Crawford v. Marion County Election Board, an early challenge to a state law requiring voters to show photo identification at the polls, Posner ruled in favor of Indiana’s voter-ID law, in part because none of the plaintiffs who challenged it said that the law would prevent them from voting. Dissenting from Posner’s ruling, one of his colleagues said that Indiana, too, lacked evidence of the existence of voter fraud, which the law was ostensibly intended to combat. It was clear enough, the colleague wrote, that thousands of poor and elderly voters would be disenfranchised.

Six years later, in “Reflections on Judging,” a recent book (he has written roughly 45), Posner criticized his original ruling. “I plead guilty to having written the majority opinion,” he wrote, upholding “a type of law now widely regarded as a means of voter suppression rather than of fraud prevention.”

Commentators pounced: A New York Times headline trumpeted “The
Debate Over Judge Posner’s Unforced Error,” and The Washington Post ran a column titled, “Judge Posner’s Mea Culpa Was Better Left Unsaid.” The lesson was clear: It’s safer for judges not to admit misgivings.

But Posner said he had simply acknowledged that judges sometimes don’t understand a subject well enough to “gauge the consequences of their decisions.” With more evidence about the results of requiring voter ID, it made sense to him to shift his position. Last year, Posner’s court heard a challenge to another voter-ID law in Wisconsin. Researching online, Posner found charts showing that strict voter-ID requirements have been enacted only in states controlled by Republicans. After a panel of three judges on his court upheld Wisconsin’s law, Posner urged the court as a whole to rehear the case. This time he wrote that the “net effect of such requirements is to impede voting by people easily discouraged from voting, most of whom probably lean Democratic.” Posner lost the argument; the panel decision was upheld and Wisconsin’s law stood.

Even the architect of the Supreme Court’s voter-ID decision has had a change of heart. In 2008, Justice John Paul Stevens wrote the majority opinion affirming Posner’s Indiana ruling by a vote of 6 to 3. But he, too, has since decided that the dissenting judges got it right about the consequences of the decision. It’s “unfortunate,” Stevens told me by phone recently, that his opinion in Crawford has prompted other states to pass voter-ID requirements.

**While there’s nothing** inherently liberal about empiricism in judging or in rethinking your positions, conservatives sometimes see it that way. (Justice Clarence Thomas has told his law clerks, “I ain’t evolving,” rejecting the suggestion that he might grow less conservative with time.) Though the Supreme Court has pulled off many shifts to the right — recently, for example, on campaign finance and gun rights — these decisions tend to reflect changes in the court’s membership. When it comes to ideological shifts by individual justices, liberals have stood to gain more. **Since the New Deal,** eight justices have become lastingly more liberal over their tenure, while only four have
moved in a conservative direction, according to the Washington University political scientist Lee Epstein.

The University of Chicago law professor Justin Driver looked for examples of justices changing their minds in major cases and also found more turns to the left. In explaining their reversals, these judges sometimes noted a human cost of a previous ruling that they hadn’t anticipated. The death penalty has caused more soul-searching than any other issue facing the modern Supreme Court; three justices (Stevens, Lewis Powell and Harry Blackmun) cast important votes to continue capital punishment and then recanted many years later, based on the evidence of its flaws in practice. “Over the years, I became more and more unhappy with the failures of the courts to impose adequate procedures in capital litigation,” Stevens, who is 95 and retired, told me.

Inevitably, judges change positions for reasons that appear to be politically motivated. Justice Owen Roberts, a Republican appointee, supplied a fifth vote to strike down several New Deal programs. In 1937, he made a sudden and temporary shift to the left — in a ruling announced shortly after President Franklin Delano Roosevelt, furious with the court, proposed a bill to expand it beyond nine members. Roberts’s “switch in time that saved nine” was derided as an act of appeasement.

But if Roberts was sensitive to the heat his court was taking, was it unreasonable for him to take public opinion into account? Maybe the fallout simply made him think and think again. Three years ago, after Chief Justice John Roberts (no relation to Owen Roberts) sided with the court’s four liberals to uphold the Affordable Care Act, Jan Crawford of CBS reported that he changed his mind about the case in the months between oral argument in March and the announcement of the court’s decision in June. Crawford’s sources were anonymous, but her account has stuck: Roberts stands accused, by fellow conservatives, of upholding Obamacare not because he believed in the constitutional reason he offered, but to spare the court the decline in public approval that often follows a divisive ruling that splits along party lines.
Conservatives have suggested that in a second case that’s soon to be
decided, Roberts should “atone for his error” by dismantling Obamacare. In
formalist terms, it would be easy enough for Roberts to distinguish the first
Obamacare case, which was about whether Congress had the power to pass the
law in the first place, from the current one, King v. Burwell, which turns on
whether four words in the statute — “established by the state” — mean that
subsidies for health insurance are available only to people who buy them
through state-run exchanges. At the argument in March, Scalia declared that
the court must read those four words literally, asking, “Is it not the case that if
the only reasonable interpretation of a particular provision produces
disastrous consequences in the rest of the statute, it nonetheless means what it
says?” But the government argues that the statute as a whole makes clear that
subsidies are also available through federally created exchanges, which are
what most states use.

If Roberts thinks this is a defensible argument, as many experts do, he
might consider the impact of denying subsidies to millions of people. Or he
might heed the pleas of the 22 states arguing to the court that when they opted
for federally run exchanges, they never thought they were making their
residents forgo subsidies. In other words, evidence exists if a judge is looking
for it. Might Roberts marshal this evidence because he harbors an inner
Holmes? It’s a question to revisit at the end of June.

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